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STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC UTILITY CONTROL

RE: PETITION OF THE DEPARTMENT : FCC FILE NO. 94-SP4
OF PUBLIC UTILITY CONTROL :
TO RETAIN REGULATORY :
CONTROL OF WHOLESALE :
CELLULAR SERVICE PROVIDERS :
IN CONNECTICUT : SEPTEMBER 16, 1994

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I. INTRODUCTION

The Connecticut Office of Consumer Counsel ("OCC") is the statutorily designated advocate for consumer interests in utility matters, pursuant to Conn. Gen. Stat. Section 16-2a(a). In carrying out its statutory mandate, the OCC was designated as a party in the Connecticut Department of Public Utility Control's ("Department") Investigation Into The Connecticut Cellular Service Market and The Status of Competition ("Investigation") in Docket No. 94-03-27. The OCC participated extensively in the Department's Investigation by way of cross examination, the filing of briefs, written exceptions and oral argument.

Based on the record in DPUC Docket No. 94-03-27, the OCC urged the DPUC to decide that there is no effective competition among Connecticut's duopolist wholesale cellular carriers, and that regulation is necessary to ensure that cellular resellers

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and end use customers are not disadvantaged by unreasonable rates and unfair practices. The OCC, therefore, supports the Department's Petition filed with the Federal Communications Commission ("FCC") for approval to retain regulatory control over Connecticut's wholesale cellular service providers until the conclusion of its anticipated July 1, 1996 review of the Connecticut's commercial mobile radio services ("CMRS") market conditions or, until October 1, 1997, if the Department determines as a result of its review that the market still is not yet truly competitive.

The Department's Petition, which is the outgrowth of its Investigation, points out that "the current market conditions sustain anti-competitive and discriminatory practices on the part of the wholesale CMRS providers." (See Petition, at 2.) These practices are the result of "the wholesale carriers' relationships with their respective retail affiliates..." which have resulted in: 1) advance notice of promotions to retail cellular affiliates of the wholesale carriers; 2) the provision of information to wholesale carriers regarding pricing strategies of independent resellers; and 3) bulk volume discounts which provide the wholesale carriers' retail affiliates with pricing advantages not available to independent resellers. (Id.) The Department's Petition also cites credible record evidence that one of the two wholesale cellular carriers

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has used "coercive tactics" in dealing with independent resellers; and that the same wholesale carrier "has violated its tariffs with respect to charging excessive interest rates, placed liens upon cellular resellers' assets, and has forced these resellers into confidentiality agreements to prevent the resellers from petitioning the Department for relief." (See Petition, at 3.) The evidence of anti-competitive and discriminatory practices justifies the Department's retention of regulation over wholesale cellular carriers.

In response to the wholesale carriers' allegation that "the impending entry of SMRS, ESMR and PCS service providers will create market conditions that will protect subscribers," the Department's Petition responds that "there are no substitutes for cellular services at this time." (Id., at 4.) Moreover, the Department points out that "the highly concentrated nature of the Connecticut CMRS marketplace will not significantly change before the year 2003." (Id.) Any competition from other service providers, therefore, will be "minimal" in the near future. (Id.)

Based on the record in Docket No. 94-03-27, the OCC supports the Department's Petition, and respectfully requests that the FCC approve it.

II. PROCEDURAL HISTORY

The Department's Investigation in Docket No. 94-03-27 commenced after a coalition of resellers ("Resellers") petitioned the Department to investigate claims of anti-competitive conditions in the cellular market. Both the OCC and the Office of The Attorney General ("AG") supported the Resellers' request for an investigation. In granting the Resellers' request, the Department stated that "the merits of [these] claims should be fully adjudicated, providing full opportunity for the presentation of testimony and additional evidence." (See Department's Decision in Docket No. 94-03-27, at 6 (attached to the Department's Petition as Appendix A.)

Accordingly, in Docket No. 94-03-27 the Department provided extensive opportunity for all interested parties and intervenors to submit evidence, and to cross examine, in order to develop a complete record. The Department employed all of the procedures which the Connecticut Uniform Administrative Procedure Act requires regarding contested cases. (See Conn. Gen. Stat. Section 4-176e et seq.) In order to provide a fair opportunity for all parties and intervenors to present evidence, both through the direct testimony of witnesses and through cross examination, the Department held hearings on May 12, 13, 16, and 20, as well as on June 3, 7, and 20, 1994. When requested, rebuttal testimony was permitted.

After hearing contradictory testimony regarding cellular market conditions, the Department, like any trier of fact, appropriately weighed all of the evidence and issued a decision which included findings of fact and conclusions based on the full record.

In conducting its Investigation, the Department was cognizant of the federal Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), 47 U.S.C. §332(c)(3)(B), which authorizes any state having rate regulation in effect on June 1, 1993 to petition the FCC to retain regulatory authority over rates and entry of all commercial mobile radio services by showing that:

- (1) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly discriminatory; or
- (2) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state.

The Department also applied the criteria adopted by the FCC in its Second Report and Order, In the Matter of Implementation of Sections 3(n)332 of the Communications Act Regulatory Treatment of Mobile Services, FCC 94-31, GN Docket No. 93-252 issued on March 7, 1994 ("FCC Second Report and Order"). Although the FCC Second Report and Order provides examples of "the types of evidence, information and analysis [considered] to

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be pertinent to [its]... examination of market conditions in consumer protection," paragraph 252 of this Second Report and Order further states that "a state should have discretion to submit whatever evidence the state believes is persuasive regarding market conditions in the state and the lack of protection for CMRS subscribers in the state."

The Department has satisfied the Budget Act's standard for retaining regulatory authority over CMRS, and also has provided the specific "types of evidence, information and analysis" which the FCC Second Report and Order indicated would be considered "pertinent" in its "examination of market conditions and consumer protection." The Department's Decision in Docket No. 94-03-27 reflects a careful analysis of the record evidence according to the eight categories included in the FCC Second Report and Order.

**III. THE DEPARTMENT'S PETITION TO CONTINUE REGULATION OF
CELLULAR WHOLESALE PROVIDERS ON AN INTERIM BASIS
SHOULD BE APPROVED**

**A. The FCC Should Accept The Department's Conclusions
From Its Investigation In Docket No. 94-03-27**

The Department's Investigation in Docket No. 94-03-27 was extensive, thorough and in full compliance with the Connecticut's statutory requirements regarding "contested cases". (See Conn. Gen. Stat. Section 4-176e et seq.) Prior to

the commencement of hearings, the Department's staff, as well as some parties and intervenors, issued interrogatories which were responded to, and the responses were made part of the record. Subsequently, expert witnesses for the wholesale cellular providers, as well as the Resellers, were given ample opportunity to present their views, to be cross-examined, and, when requested, to present rebuttal testimony. In addition, the Department heard compelling testimony regarding specific anti-competitive practices.

Not surprisingly, in a proceeding of this magnitude, the Department heard conflicting testimony. The Department, as the trier of fact in Docket No. 94-03-27, had to weigh the evidence, judge the credibility of witnesses and ultimately determine facts and draw conclusions. (See Laufer v. Conservation Commission, 24 Conn. App. 708, 713-714 (1991), citing Jaffe v. State Department of Health, 135 Conn. 339, 343, 64 A.2d 330 (1949) and Altholtz v. Dental Commission for Conn. App. 307, 310, 493 A2d 917 (1985).) The Department's decision to file a petition with the FCC is amply supported by the record from its Investigation, and is not arbitrary, capricious or an abuse of discretion.

Since the Department's Petition is supported by an extensive record developed through the hearing process, the criteria for continued regulation of CMRS rates and entry have

been met. Therefore, the Department's Petition to the FCC should be granted. To do otherwise would result in the unfair substitution of the Department's careful and well reasoned judgment based on all of the evidence presented.

B. The Department's Decision in Docket No. 94-03-27 Contains Ample Grounds on Which to Grant a State Petition to the FCC to Continue Wholesale Cellular Rate Regulation on an Interim Basis

As the Department's Decision in Docket No. 94-03-27 points out, there are "anti-competitive and discriminatory practices on the part of the wholesale CMRS providers "which ensue from the wholesale carriers' relationships with their respective retail affiliates." (See Petition, at 2.) This conclusion is supported by the record in Docket No. 94-03-27.

The following are specific examples of anti-competitive and discriminatory practices by wholesale cellular carriers which are both a part of the record in Docket No. 94-03-27, and are cited in the Department's Decision, which forms the basis for its Petition:

1. Resellers of Springwich have been required to discuss their retail rates and competitive pricing strategies with SNET Cellular, the parent corporation of Springwich;
2. Springwich has required resellers to switch their long distance carrier from AT&T to SNET America, an affiliated interexchange carrier;

3. Springwich's affiliated reseller has obtained an unfair competitive advantage from having the most prominent advertising in all of The Southern New England Telephone Company's Yellow Pages directories;
4. Springwich's affiliated reseller has an unfair advantage in being able to activate cellular numbers for customers at any time, including weekends and holidays, which competitor resellers are not able to do;
5. Springwich has established unnecessary barriers which ensure that end users and resellers pay for most dropped calls regardless of whether they received the full value of such calls;
6. Resellers are unfairly billed for overlapping calls, regardless of the fact that wholesale cellular providers have the ability to bill for usage in smaller increments of time.
7. Springwich has forced cellular service resellers into confidentiality agreements which prohibit them from disclosing or complaining about the nature of coercive credit relationships; and
8. Independent resellers have not been able to purchase service at the same rate as affiliated resellers because of an anti-competitive rate structure.

(See Decision, at 23-27.)

Based on these facts alone, the Department's Petition to the FCC should be granted.

The Department's objective of retaining authority to regulate wholesale cellular prices on an interim basis is further supported by its findings regarding the market power of

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the wholesale cellular providers. Such market power is projected to continue. (See Petition, at 4.) Although the Department recognized that the marketplace may change with the introduction of other service providers, the Department reasonably assumed that the entry of PCS and ESMR service providers will not immediately change the CMRS market conditions, and that further investigation commencing July 1, 1996 would be appropriate in order to determine whether the marketplace has, in fact, become truly competitive.

IV. CONCLUSION

The Department made an extensive investigation of wholesale cellular market conditions in Connecticut. Based on this Investigation, which was conducted in accordance with the procedures applicable to contested administrative cases, the Department correctly concluded that a continuation of regulation of wholesale cellular providers rates is necessary in order to protect the public. Accordingly, in order to continue such rate regulation, on an interim basis, the Department decided to petition the FCC, which it has done.

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Based on the Department's considered judgment and the actual record in Docket No. 94-03-27, the Department's Petition to the FCC should be granted.

Respectfully submitted,
OFFICE OF CONSUMER COUNSEL

By Valerie J. Bryan
Valerie J. Bryan
Staff Attorney

I hereby certify that a copy of the foregoing has been mailed and/or hand-delivered to all known parties and intervenors of record this 16th day of September, 1994.

Valerie J. Bryan
Valerie J. Bryan
Commission of the Superior Court